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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 500

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, ET AL.,
*Respondents.**

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MISSOURI PACIFIC RAILROAD COMPANY, NATCHEZ & SOUTHERN RAILWAY COMPANY and THE TEXAS & PACIFIC RAILWAY COMPANY.*

Opinions Below

The opinion of the Court of Appeals (App. A of Petition), not yet officially reported, is unofficially reported at

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* For reasons best known to itself, petitioner has included as respondents in the caption of its petition "Certain Carriers Represented by the Eastern, Western & Southeastern Carriers' Conference Committee" in addition to the named individual railroads on whose behalf this brief is filed, Ralph T. Seward and the United States. The only railroads named as respondents in the court below (other than the railroad involved in that aspect of the case which is the subject of the petition in No. 501) are the individual railroads named as respondents here. In order to avoid confusion, however, we have adopted the caption utilized by petitioner. We note, also, that the Natchez & Southern Railway Company has been merged into the Missouri Pacific Railroad Company.

55 CCH Labor Cases §11,931. The opinion of the District Court (JA 150-159) is reported at 248 F. Supp. 1008.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Whether the ruling by Arbitration Board No. 282 in answer to BRT Question No. 36 that its Award does not require special boards of adjustment created pursuant to the Award to follow the procedures specified in Sections 7 and 8 of the Railway Labor Act constitutes a permissible interpretation of the language of the Award?

2. If the answer to the above question is in the affirmative, whether a judgment in a prior proceeding between the same parties, among others, upholding the validity of the Award is *res judicata* and bars any attack in this proceeding upon the validity of the Award as so interpreted?

3. Whether petitioner, which refused to participate in the proceedings of the special boards of adjustment involved in BRT Question No. 36 and which did not object to the procedures followed by those special boards, thereby waived any objections it may have had to those procedures and is estopped from raising such objections on appeal?

Statement of the Case

In November of 1959, most of the nation's Class I railroads served five unions (including petitioner) with notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) of proposed changes in a number of obsolete rules which were causing serious overmanning of trains. One of the proposals thus made was to abolish all rules requiring the use of trainmen (such as brakemen and helpers) in road and yard service, and to permit management to determine

the number of such trainmen to be used in its discretion. In September of 1960, the unions served the railroads (including these respondents) with Section 6 notices of various counterproposals, including a proposal by petitioner to establish a rule requiring the use of at least two trainmen on all crews in road and yard service. The parties exhausted the "major" dispute procedures of the Railway Labor Act (45 U.S.C. §§ 151-160) without settling this dispute, and thus were in a position to resort to self help including strikes by the unions. See *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

To prevent such a disaster, Congress enacted P.L. 88-108 (77 Stat. 132). That statute committed the crew-consist issue raised by those aspects of the Section 6 notices referred to above and another issue involving the use of locomotive firemen to final and binding arbitration by an arbitration board commonly known as Arbitration Board No. 282. Section III of the Award (JA 5-10) by Arbitration Board No. 282 related to the crew-consist issue, and is set forth in Appendix A hereto. It provided, among other things, that no change could be made in rules requiring a stipulated number of trainmen to be used in road and yard service except by agreement or pursuant to the procedures established by the Award. In general, those procedures permitted either a carrier or a union to serve the other with written notice of proposed changes in rules requiring a stipulated number of trainmen, provided that they should confer and attempt to reach agreement upon such proposals in the light of "guidelines" or standards specified in the Award, and provided that, if no agreement was reached, the dispute could be submitted by either party to a special board of adjustment (composed of one representative of the carrier, one representative of the union and a neutral member) for final decision, pursuant to those guidelines.

Petitioner and three other unions filed petitions to impeach the Award, pursuant to Section 9 of the Railway Labor Act (45 U.S.C. § 159) as incorporated by Section 4 of P.L. 88-108, contending that the Award did not comply with P.L. 88-108 and was otherwise invalid. The validity of the Award was upheld, however, in a decision that has become final. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D. D.C., 1964), aff'd *per curiam*, 331 F. 2d 1020 (D.C. Cir., 1964), cert. den., 377 U.S. 918 (1964).

The crew-consist provisions of the Award became effective of January 25, 1964, and these respondents served petitioner on that date with notices pursuant to the Award of proposed changes in their rules requiring a stipulated number of trainmen on crews in road and yard service. Petitioner refused to confer or negotiate in an attempt to reach an agreement upon those proposals, so these respondents invoked the special-board procedures established by the Award and four special boards of adjustment were established to determine the disputes over the four notices which were served. After raising certain jurisdictional objections—all of which have since been abandoned and none of which are involved here—petitioner refused to participate any further in the proceedings of the special boards. Thus, petitioner did not, before any of the special boards, object to the procedures which they followed or request that they follow the procedures specified in Sections 7 and 8 of the Railway Labor Act (45 U.S.C. § 157, 158). See JA 15-21.

The special boards issued their awards on May 6, 1967 (JA 72-103), upon the basis of documentary evidence submitted by these respondents (JA 17-19), who notified petitioner that the awards would be put into effect on May 11, 1964. On that same day, petitioner filed a complaint in

the United States District Court for the Eastern District of Missouri and obtained a temporary restraining order preventing effectuation of the awards. After a hearing, however, that court dismissed the complaint on jurisdictional grounds and dissolved the restraining order. *Brotherhood of Railroad Trainmen* v. *Missouri Pacific R. Co.*, 230 F. Supp. 197 (E.D. Mo., 1964). Petitioner then filed in the United States District Court for the District of Columbia a motion for supplemental relief under the judgment upon the Award by Arbitration Board No. 282, requesting that the special board awards be set aside as void for several reasons including a contention that the special boards were subject to the requirements of Sections 7 and 8 of the Railway Labor Act. *In re Certain Carriers, Etc.*, 231 F. Supp. 519 (D. D.C., 1964). In denying that motion upon its merits, that court held that Sections 7 and 8 "are not applicable to the special boards of adjustment" created under the Award (*id.*, at 521), and noted "that it is questionable whether the plaintiff is in a position to challenge the procedure of the [special boards], for it declined to participate in the hearing" (*id.*, at 521).

Upon appeal from that decision, the Court of Appeals for the District of Columbia Circuit held that Arbitration Board No. 282 had primary jurisdiction to determine whether its Award required the special boards of adjustment to follow the procedures specified in Sections 7 and 8 of the the Railway Labor Act, and remanded the case with directions for entry of an order permitting that issue (and another which is not involved here) to be submitted to Board 282. *Brotherhood of Railroad Trainmen* v. *Certain Carriers, Etc.*, 349 F.2d 207 (D.C. Cir., 1965). In so doing, the Court of Appeals also noted that petitioner's refusal to participate in the proceedings of the special boards and its failure to request those boards to follow

the procedures specified in Sections 7 and 8 cast doubt upon petitioner's right to raise that issue (*id.*, 209-210), and stated that "Board 282 could also consider what significance to attach to [petitioner's] failure to raise the issue before the Special Board" (*id.*, at 210, fn. 11).

Petitioner then submitted BRT Question No. 36 (JA 66-71) to Board 282. This was a lengthy multi-part question which raised a number of issues as to the interpretation of Award 282, most of which are not involved here. The issue as to whether the Award required the special boards of adjustment to follow the procedures specified in Sections 7 and 8 of the Railway Labor Act was raised by Parts (B) and (C) of BRT Question No. 36, to which Board 282 answered, on October 10, 1965, (JA 70) that:

> "The special boards of adjustment provided for in Section III, Part B, of Award 282 are not required by the terms of the Award to adhere to procedures prescribed in either Section 7 or Section 8 of the Railway Labor Act."

This answer was accompanied by a Preliminary Statement (JA 54-64), which is reproduced in Appendix B hereto.[1] Among other things, the Board noted that several of the provisions of the Award were inconsistent with the requirements of Sections 7 and 8 of the Railway Labor Act (App. B, at 29-30), and stated that "it was never our intention that the special boards of adjustment for which we provided would be subject to Sections 7 and 8 of the Railway Labor Act" (App. B, at 31). The Board's detailed explanation of why that was so is set forth in App. B, at 28-31. In addition, the Board stated (App. B, at 33) that:

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[1] The Preliminary Statement also related in part to BRT Questions No. 32 and 33.

"A party which refuses to participate in the proceedings before the special board and files its formal objection only after decision has been rendered is, in the absence of extenuating circumstances, properly estopped from protesting that its procedural rights have been violated."

And, while a party desiring a transcript of the proceedings before a special board "is entitled to have it," with "that right comes the obligation to pay the cost" (App. B, at 33).

A petition (JA 46-53) to impeach these and certain other rulings by Board 282 was filed by petitioner, pursuant to Section 9 of the Railway Labor Act as incorporated by Section 4 of P.L. 88-108, in the United States District Court for the District of Columbia, and was denied by that Court (JA 159-160). In its opinion, the District Court concluded "that the decisions of Board 282 involved in this proceeding, were entirely valid and proper and should be sustained" (JA 159), and stated, among other things, that (JA 158-159):

"The principal attack on the decisions of the special boards of adjustment, is that the proceedings conducted by these tribunals were informal and that no stenographic record was made of the testimony. The United States was, without objection, permitted to intervene in the present action. Counsel for the Government at the oral argument informed the Court that practically all of these boards proceeded in the same manner and that no stenographic records were kept by most if not all of them. He called attention to the fact that at this late date if this mode of procedure were held to be in violation of law, it would be necessary to set aside and vacate all of the rulings of the

special boards and to require them to conduct new hearings. The result would be delay and expense with possible detriment to both sides of the controversy. It does not appear that the Brotherhoods either requested the boards to proceed in any other manner, or that they moved that a stenographic record be kept of the testimony. It is not unlikely that if such a request had been made at the beginning, it might well have been complied with. It is not appropriate for them to raise the objection at this late date after remaining silent while the special boards were in operation."

The Court of Appeals affirmed the dismissal of the impeachment petition. In so doing, that Court held, among other things, that petitioner's "statutory argument is now precluded as being *res judicata* by virtue of the earlier review of the Award" (Pet., App. A, at 3a), that petitioner's "contentions cannot first be made on appeal" and thus are barred by its refusal to participate in the special board proceedings and its failure to object to the procedures followed by the special boards (*id.*, at 4a-5a), and that (*id.*, at 5a) "even more than that is involved here" since:

"The Special Boards of Adjustment were limited, by Appellant's absence, to receiving documentary evidence submitted by the carriers. Since Appellant was not present to challenge the carriers, there was no occasion for a formal hearing in the usual sense; there was, therefore, no one to whom to give an oath and no testimony to transcribe. A party may not allege on appeal as error an action which he had induced the tribunal to take; by boycotting the Special Boards of Adjustment, the Appellant did not merely induce the

alleged errors but also made them necessary if the disputes were to be settled promptly."

Section 4 of P.L. 88-108 provided, among other things, that the Award by Arbitration Board 282 "shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise." Board 282 provided in its Award for a two year period which expired, insofar as the crew-consist provisions of the Award are concerned, on January 25, 1966. In another proceeding, the District Court has held that the modifications in the carriers' prior crew-consist rules made by agreements and special board awards pursuant to the procedures established by Award 282 continue to apply after January 25, 1966 (until changed in accordance with the Railway Labor Act), but that the procedures established by the Award cannot be invoked after January 25, 1966. *Akron & Barberton Belt R. Co.* v. *Brotherhood of R. Trainmen*, 250 F. Supp. 691 (D. D.C., 1966), supplemental opinion, 252 F. Supp. 207 (D. D.C., 1966). Those rulings have been affirmed by the Court of Appeals. *Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt R. Co.*, — F. 2d —, 55 CCH Labor Cases ¶ 11,912 (D.C. Cir., May 12, 1967), supplemental opinion, — F. 2d —, 56 CCH Labor Cases ¶ 12,095 (D.C. Cir., July 31, 1967). If those rulings become final, these respondents would not be able to have their proposed changes in crew-consist rules determined under the procedures established by the Award should the special board awards involved here be declared to be invalid.

Argument

The court below noted that "this case is merely the latest manifestation of a litigation syndrome that seems to keep the railroads and various governmental entities in the court on an ancient issue" (Pet., App. A, at 1a). The symptoms of petitioner's "litigation syndrome" apparently have become even more manifest. Petitioner has filed two petitions for writ of certiorari from the judgment in the proceeding below—this petition and No. 501. Both of the petitions appear to us to be without substance, as we demonstrate herein with respect to the instant petition.

Petitioner, in the statement of its Reasons for Granting the Writ, attacks only the holding below that it is precluded by principles of *res judicata* from attacking the validity of Award 282 in this proceeding. Petitioner does not contend here that the ruling by Board 282 in answer to BRT Questions No. 36(B) and (C) is not a reasonable interpretation of the language of Award 282. Petitioner does not question here the merits of the four special board awards which are involved. And, most importantly for present purposes, petitioner does not contend here that the court below erred in its holding that petitioner is precluded, by its failure to participate in the proceedings of the special boards of adjustment or to object to the procedures followed by those special boards, from questioning the validity of those procedures on appeal.

As might be expected from petitioner's failure to contend to the contrary in its petition, this alternative basis for the judgment below is undoubtedly correct. As this Court stated in *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37 (1952), "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the

courts." This salutary principle is applicable to proceedings of arbitration boards. *Bower* v. *Eastern Airlines*, 214 F. 2d 623, 627 (3d Cir., 1954); *Chicago, R. I. & P. Ry. Co.* v. *Union Pac. R. Co.*, 254 Fed. 235, 238 (8th Cir., 1918). We are not aware of any decisions to the contrary and, obviously, none have been cited by petitioner. Moreover, the reasons for applying this principle here are even greater than normally is true in view of the decision below, in another case, that the procedures established by the Award no longer can be invoked so as to permit new awards to be obtained if the present awards should be set aside. See p. 9, *supra*. Since the judgment below is adequately supported on this basis alone and should not be reversed even if the Court of Appeals erred in its application of the principles of *res judicata*, this is not a case which should occupy the time of this Court, even if the *res judicata* issue otherwise might be worthy of review.

In fact, however, the *res judicata* issue is not worthy of review by this Court, even if it had constituted the sole basis for the judgment below. We believe that the decision below with respect to that issue is clearly correct, but at most all that is involved is the application of established legal principles to the facts of this particular case. The only other decisions applying those principles to the same essential facts (both of which were by the court below and one of which is now here on petition for writ of certiorari in No. 499) reached the same result. Hence, there is no conflict of decisions and no issue of general importance sufficient to justify a grant of the petition under the standards established in Rule 19 of this Court.

Petitioner's contention that Award 282 is invalid because it did not require the special boards of adjustment to follow the procedures specified in Sections 7 and 8 of the Railway

Labor Act is grounded upon the provision in Section 4 of P.L. 88-108 that:

> "To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act."

It seems apparent from the face of this provision that it applies to the arbitration by the "arbitration board to consist of seven members" established by Section 2 of P.L. 88-108; *i.e.*, to the proceedings of Arbitration Board No. 282, which have been conducted in accordance with Sections 7 and 8 insofar as those sections are not inconsistent with P.L. 88-108. Board 282 so stated in its Preliminary Statement (App. B., at 30), and the District Court so concluded (JA 156).

But however that may be, it is entirely plain from the language of Award 282 that it did not require the special boards of adjustment to conform with the provisions of Sections 7 and 8 of the Railway Labor Act. In addition to omitting any language which might be interpreted as requiring the special boards to follow the procedures specified in those statutory provisions, the Award contains several provisions which which plainly are inconsistent with any such requirement, as Board 282 noted (App. B, at 29-30). The Award limits the special boards to three members (App. A, at 20); Section 7 First of the Railway Labor Act permits the parties to agree upon either three or six members. The Award allows the partisan members ten days after the selection of the second partisan member in which to select the neutral member (App. A, at 20); Section 7 Second of the Railway Labor Act allows the partisan members five or fifteen days after their first meet-

ing in which to select the neutral member or members. The Award provides that the fees and expenses of the neutral member and other incidental expenses shall be shared equally by the parties (App. A, at 21); Section 7 Third (e) of the Railway Labor Act provides for payment by the National Mediation Board of such fees and expenses. And, of course, Section 7 First of the Act requires an agreement to arbitrate the terms of which are specified in elaborate detail in Section 8 of the Act, while Section III-B(1) of the Award (App. A, at 20) permits "either party" to refer a dispute to a special board of adjustment without requiring an agreement of any kind.

In short, there never has been any basis for substantial doubt about the fact that the Award did not subject the special boards to the requirements of Section 7 and 8, as is indicated by the fact (see p. 7, *supra*) that practically all of the special boards disregarded Sections 7 and 8, and not just the four boards involved in BRT Question No. 36. Consequently, the contention that the Award is invalid because it did not require the special boards to conform to the procedures specified in Sections 7 and 8 of the Railway Labor Act was available to petitioner from the outset.

Under Section 9 Second of the Railway Labor Act, as incorporated by Section 4 of P.L. 88-108, issues as to the validity of the Award had to be raised in an impeachment petition filed within 10 days after the Award was filed with the district court.[2] As noted in our Statement of the Case (p. 4, *supra*), petitioner did file a petition to impeach the validity of the Award, contending that it did not comply

[2] "An Award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties." 45 U.S.C. § 159 Second.

with the requirements of P.L. 88-108. One of the specific contentions made in that regard was "that the arbitration board lacked authority to require the parties to bear the expenses of neutral members of the local adjustment boards." 225 F. Supp., at 21. While petitioner did not base that contention upon an argument that Sections 7 and 8 of the Railway Labor Act applied to the special boards, such an argument could have been made if thought to have any merit since Section 7 Third (e) provides that arbitrators named thereunder "shall receive from the [National] Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator."

Consequently, we submit that the court below undoubtedly was correct in its explanation of its *res judicata* holding (Pet., App. A, at 3a-4a, fn. 5), as follows:

> "In the action to impeach the Award, to which the BRT was a party, the unions claimed that the Award did not satisfy the requirements of Public Law 88-108; the District Court held that it did .... The BRT's identical claim in this litigation, therefore, is determined by considerations of *res judicata*. The fact that it apparently did not urge this particular theory of illegality at the time of its impeachment action is, of course, irrelevant. A party may not litigate one issue and then, upon an unsuccessful disposition, revivify the same cause of action with a new theory. In any case, the BRT must have been aware at that time of the theory it now urges. It argued that Board 282 lacked authority to require the parties to bear the expenses of the neutral members on the local Special Boards since the parties had agreed to permit the government to bear the cost; yet it surely must have known that

Section 7 Third (e) of the Railway Labor Act requires the government to pay. It was in a position, therefore, to realize that Board 282's Award did not call for the local Special Boards to act pursuant to the Railway Labor Act. There is no basis for the argument that the BRT could assume that the local Special Boards would be conducted in accordance with the Railway Labor Act and that the divergence from that Act was not in the Award but in the later actions of the Special Boards."

Petitioner contends (Pet., at 15-16) that the court below misapplied the *res judicata* doctrine established in such cases as *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 (1948), because it erred in concluding that petitioner was asserting the same cause of action as that which it asserted in its petition to impeach the validity of the Award. But it is petitioner, not the court below, which has erred in this regard. Petitioner is now contending in effect that the answer to BRT Question No. 36 is invalid because the Award itself is invalid, rather than because that answer did not reasonably interpret the language of the Award.[3] That is the same cause of action as was asserted in the petition to impeach the Award and, as this Court held in the *Sunnen* case relied upon by petitioner, the judg-

[3] Issues as to whether a ruling by an arbitration board as to the meaning or application of its award, pursuant to Sections 7 Third (e) and 8(m) of the Railway Labor Act, constitutes a reasonable interpretation of the language of its award can, of course, be raised in a petition to impeach such a ruling under Section 9 of the Act. *Order of Railroad Telegraphers* v. *New York Central R. Co.*, 181 F. 2d 113 (2d Cir., 1950); *Mid-Continent Airlines* v. *Brotherhood of Railway, Etc.*, 83 F. Supp. 976 (W.D. Mo., 1949). This was recognized by the court below in that aspect of its opinion (Pet., App. A, at 1a-3a) which is the subject of the petition in No. 501, in rejecting a contention by petitioner that the ruling by Board 282 in answer to BRT Question No. 33 did not properly interpret the language of Award 282.

ment in the original action "puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever" because "the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." 333 U.S., at 597.

In any event, as the above quotation from the opinion of the court below demonstrates, that court recognized that the same cause of action must be involved in order to preclude a party from raising in the second proceeding an issue which it could have, but did not, raise in the first proceeding. As the court below stated, a "party may not litigate one issue and then, upon an unsuccessful disposition, revivify the same cause of action with a new theory." Hence, even if there were basis for doubt about the conclusion that the same cause of action is involved in this proceeding as in the earlier impeachment proceeding, all that is involved is the application of established principles to the facts of the particular case. As we understand, this Court normally does not exercise its discretionary certiorari jurisdiction to review such issues. See Stern & Gressman, *Supreme Court Practice* (3d ed., 1962), at 140-141, 146-148.

At the very commencement of petitioner's efforts to invalidate the four special board awards involved here, in the proceeding brought in the Eastern District of Missouri (see p. 5, *supra*), that Court stated that "any issue involving the validity of Award 282 . . . is not an open one because the only forum with authority to determine that issue has determined it adversely to" petitioner in the initial impeachment proceeding. *Brotherhood of Railroad Trainmen* v. *Missouri Pac. R. Co.*, 230 F. Supp. 197, 201

(1964). In addition to the decision before the Court in this petition, the court below similarly applied the *res judicata* doctrine in refusing to impeach rulings by Board 282 with respect to two other special board awards—in the case now before this Court on petition for writ of certiorari in No. 499 and in the case decided by the opinion attached to the petition herein as Appendix E.

There are no decisions to the contrary.[4] Furthermore, there is no prospect that the issue will arise in any other cases, at least if the decision below in another proceeding that the procedures established by the Award no longer can be invoked becomes final, since neither petitioner nor any other union sought to impeach any rulings by Board 282 concerning the validity of special board awards apart from the rulings involved in the cases which have been referred to. Under Section 9 of the Railway Labor Act, as incorporated by Section 4 of P.L. 88-108, a petition to impeach those rulings had to be filed within 10 days after they were filed with the District Court, which time has long since expired. And, after acquiescing in and complying with the non-contested special board awards for periods of more than 19 months (see Pet., App. G, at 18a-21a), petitioner would be barred by laches from requesting Board 282 now to rule that such awards do not comply with its

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[4] Contrary to petitioner's contention (Pet., at 12), the earlier decision by the court below, in *Brotherhood of Railroad Train.* v. *Chicago, M., St. P. & P. R. Co.*, 345 F.2d 985 (D.C. Cir., 1965), is not to the contrary. That case held that Board 282, rather than the courts, had primary jurisdiction to determine whether an award by a special board of adjustment complied with its Award. After the special board award there involved was upheld by Board 282, and petitioner sought to impeach that ruling by contending that the Award as so interpreted was invalid, the court below held such a contention to be precluded by the *res judicata* doctrine, in the opinion attached to the petition herein as Appendix E (p. 14a). (That case also involved certain issues not involved here which were disposed of on other grounds (p. 15a).)

Award. Consequently, this case does not involve an issue of general importance so as to justify a possible grant of certiorari despite the absence of any conflict of decisions.

Conclusion

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT W. YOST
210 N. Thirteenth St.
St. Louis, Missouri 63103

SHEA & GARDNER
734 Fifteenth St. N.W.
Washington, D.C. 20005
Of Counsel.

FRANCIS M. SHEA
RICHARD T. CONWAY
734 Fifteenth St., N.W.
Washington, D.C. 20005

JAMES R. WOLFE
CHARLES I. HOPKINS, JR.
Union Station Building
Chicago, Illinois 60606
Attorneys for Respondents Missouri Pacific Railroad Company, Natchez & Southern Railway Company and The Texas & Pacific Railway Company.

APPENDIX A

III. Consist of Road and Yard Crews (Other Than Engine Service)

Part A—Basic Provisions

A(1). The issue of crew consist (other than engine service) shall be remanded to the local properties for negotiation. Pending the consummation of local agreements disposing of the issue, the following provisions shall govern the use of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, and flagmen) employed in all classes of road service, including all miscellaneous and unclassified services, and the use of brakemen or helpers employed in all classes of yard, transfer, and belt line service, including all miscellaneous yard services.

A(2). No change shall be made in the scope or application of rules in effect immediately prior to the effective date of this Award, whether established by agreement, interpretation, or practice, which require a stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) in any class of road service, including all miscellaneous and unclassified services, or which require a stipulated number of brakemen or helpers in any class of yard, transfer, or belt line service, including all miscellaneous yard services, except by agreement, or pursuant to the provisions of this Award.

A(3). Either party in interest shall give written notice of any proposed change in any such stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) used in any class of road service, including all miscellaneous and unclassified services, in the following categories:

(a) branch lines, including the use of main lines where necessary to reach initial or final terminals of the branch line train; and

(b) road service where existing rule, practice, or interpretation now requires the employment of more or less than 2 trainmen;

and of any proposed change in any such stipulated number of brakemen or helpers used in any class of yard, transfer, or belt line service, including all miscellaneous yard service. The parties in interest, as that term is used in this Award, shall include only the carrier and the organization representing the class or craft of employees holding seniority rights to the position or positions proposed to be abolished or created in the seniority district or districts in which such changes are proposed. The time and place for the beginning of conferences between the representatives of the parties in interest with respect to such proposed change or changes shall be agreed upon within 10 days after the receipt of said notice, and said time shall be within 15 days after the receipt of said notice.

PART B—REVIEW PROCEDURES

B(1). If no agreement is reached between the parties as to the application of the guidelines enumerated in Part C of this Award, the dispute limited to the application of such guidelines as related to the issue involved may be referred by either party to a special board of adjustment.

B(2). Such special board of adjustment shall be chosen in the following manner:

(a) Each party in interest shall name one member within 10 days after notice has been given that the dispute will be referred to such special board of adjustment; and the two partisan members so chosen, within 10 days after the date of the selection of the second partisan member, shall name the neutral member, who shall be chairman of the board. If the members chosen by the parties shall fail to name the neutral member of the board within 10 days, the National Mediation Board shall be requested to name such member within 5 days after the receipt of such request.

(b) If either party fails to name a member of the board within the 10 days provided in paragraph B(2)(a) of this Award, the National Mediation Board shall be requested to name such member in lieu of such

party and shall also name the neutral member necessary to constitute a board of 3 members, all within 5 days after the receipt of such request.

B(3). Decisions of the special board of adjustment shall be rendered within 60 days after the appointment of the neutral member. A decision of the majority of the board shall be binding upon both parties. The parties shall assume the costs and expenses of their respective representatives. The costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement.

PART C—GUIDELINES

C(1). The special board of adjustment in making its decisions shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions.

C(2). General considerations.

(a) Assurance of adequate safety.
(b) Avoidance of unreasonable burden or workload on members of the crew.
(c) Changes in operating conditions, including density of traffic.
(d) Practices regarding the consist of crews in comparable situations where such practices are not in dispute.
(e) Special conditions which exist on any particular assignment.
(f) Duties required in compliance with the carrier's operating rules and instructions applicable to the crew in question.
(g) Physical characteristics of the line to be traversed and in the areas where switching or industrial work is to be performed (including grade and general climatic conditions).
(h) The number of highway, street, road, railroad, or other crossings or intersections to be protected.

(i) State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersections.
(j) Availability and use of communication equipment (such as, but not limited to, end-to-end train radio, train to way-side radio, and walkie-talkies).
(k) The presence or absence of a fireman in the engine service crew.

C(3). Particular considerations—passenger road service.

(a) The amount of baggage and storage mail to be handled on and off the train at intermediate stations by the train crew.
(b) The number of passenger cars handled in the train and passenger count.
(c) The method of handling passenger transportation (tickets).
(d) The number of passengers boarding and leaving the train at intermediate stations.
(e) Duties required other than the above on any particular assignment.

C(4). Particular considerations—freight service, including miscellaneous and unclassified services.

(a) The amount and nature of work to be performed en route.
(b) The length of train, in context with the amount and nature of work to be performed en route.
(c) Time limitations applicable to the particular assignment.

C(5). Particular considerations—yard, transfer, and belt line service, including all miscellaneous yard services.

(a) The amount and nature of the work to be performed.
(b) Volume of work considered in context with applicable service time limitations.

Part D—Employee Protection

D(1). Road trainmen and yard brakemen or helpers, other than those on furlough on the date that this Award becomes effective, shall be known and designated, for the purposes of this Award, as "protected employees."

D(2). A "protected employee," known and designated as provided in paragraph D(1) of this Award, shall retain his rights to and obligations to protect road and yard service assignments (including all assignments in miscellaneous and unclassified road services and all assignments in transfer, belt line, and miscellaneous yard services) for which he is qualified, as provided by rules in effect on the day preceding the day this Award becomes effective, to the extent that such positions are available to him in his seniority district, unless and until retired, discharged for cause, or otherwise removed from the carrier's active working lists of road trainmen and yard brakemen or helpers by natural attrition; provided, that no such "protected employee" shall have any right to jobs or positions that the carrier may discontinue pursuant to the provisions of this Award if other employment in any such classes of service, for which such employee is qualified, is available to him in his seniority district. If and when the carrier is required to create new jobs or positions for road trainmen or yard brakemen or helpers, pursuant to the provisions of this Award, such positions shall first be filled, to the extent available, by "protected employees" then filling positions which the carriers would otherwise have the right to abolish or eliminate pursuant to the provisions of this Award, before such jobs or positions may be claimed by other employees of the carrier in accordance with their seniority rights.

APPENDIX B

Preliminary Statement

BRT Questions 32, 33, and 36 raise issues of considerable importance, the implications of which extend beyond the bounds of the matters directly involved. These issues are not new; we have previously considered all of them and have dealt with them, directly or by implication, either in our initial Award and Opinion or in subsequent interpretations. They are important, nevertheless, primarily because of the circumstances leading up to their submission to this Board.

BRT Question 32 grew out of a dispute between the Brotherhood and Chicago, Milwaukee, St. Paul & Pacific Railroad Company. The Carrier having sought reduction in the size of train crews on a large number of assignments, two special boards (each with the same personnel) were established and subsequently rendered awards, dated July 10, 1964, now challenged by the Brotherhood. Initially, the Brotherhood brought suit in the United States District Court for the District of Columbia against the Carrier and the members of the special boards for a declaration that the awards are void, and for an injunction to restrain the Carrier from putting them into effect. The prayer for relief was based on allegations that the Carrier's notices of proposed reductions in yard and baggagemen crews included such a large number of different job assignments as to violate the terms and intent of Award 282; that the Carrier refused to negotiate in the manner contemplated by Award 282, with the result that arbitration was prematurely and improperly invoked; that the special boards lacked jurisdiction over the issue involving baggagemen; that the special boards denied the Brotherhood a full and fair hearing, thereby violating its right to due process guaranteed by the Fifth Amendment; and that the awards of the special boards are void because they were not based on the guidelines established by Award 282. On October 23, 1964, District Judge Robinson, after thoroughly reviewing all these allegations, denied the requested relief, and

the Brotherhood appealed. By stipulation the record in the proceeding before Judge Robinson has been received in evidence and made a part of the record before this Board in the proceeding involving B.R.T. Question No. 32.

On April 15, 1965, the Court of Appeals for the District of Columbia, in an opinion by Chief Judge Bazelon, ruled that "Board 282 is best able to decide" the questions raised by the BRT. Accordingly, it remanded the case to the district court with instructions to dismiss the complaint without prejudice to the right of either party to make further application to Board 282. BRT Question 32, filed with us on June 11, 1965, presents to this Board the same issues previously considered and disposed of by Judge Robinson.

On September 28, 1965, the Brotherhood submitted a supplemental filing in respect to Question 32. This document recites that on September 21, 1965, the Milwaukee Railroad served a second notice covering crew consists on its Lines East covering all jobs assignments not included in the notice which initiated the disputed proceedings discussed above. The BRT charges that the Carrier is "clearly seeking a blanket rule to apply on all its yard assignments, whereas it led the first Special Board to believe that the reduction in crew would be justified only on the 162 out of 312 job assignments."

The BRT asks us to expand our answer to Question 32 to cover the situation created by the second notice filed by the Carrier. This we decline to do. The proceeding involving the Carrier's first notice has been completed, and the special board's award is before us for review. In contrast, no proceedings involving the Carrier's second notice have even begun, and no specific questions arising out of that notice which involve the interpretation or application of Award 282 have been submitted to us. We believe, however, that the views expressed below on issues previously raised in connection with BRT Questions 32, 33 and 36 will be helpful to the Brotherhood in its determination of the position it wishes to take in respect to the second notice.

BRT Question 33 also arose out of a dispute with the

Milwaukee Railroad. On June 23, 1965, the Brotherhood submitted the question to this Board, asking for a declaration that the Carrier had violated Award 282 by reducing the crew consist of a conductor and two brakemen to a consist of a conductor and one brakeman on certain main line and branch line freight trains and on certain main line passenger trains. On July 9, the Brotherhood filed in the United States District Court for the District of Columbia a motion for supplemental relief against the Carrier in the form of an order requiring it to comply with Award 282 and to cease and desist from effectuating any reduction in crew consist on any trains operating in road service from the crew consist which existed on the effective date of that Award. The motion also asked that the employees heretofore displaced be restored to their former positions with back pay. On August 6, Circuit Judge Miller, sitting by designation and assignment, ordered that the Brotherhood's motion be "held in abeyance until Arbitration Board No. 282 has answered [BRT] Question No. 33 . . . ."

In a supplemental filing, submitted on August 12, the Brotherhood takes the position, based on language in Judge Miller's memorandum opinion, that it has been judicially determined that a change in *any* train crew consist existing on the effective date of Award 282 can be made only in accordance with procedures set forth in that Award, whether or not such crew consist was established by a rule requiring a stipulated number of crewmen. The BRT specifically asks us, in addition to answering Question 33, to place this same construction on the relevant provisions of Award 282.

BRT Question 36 is a long, multipart question involving disputes over the reduction of train crew consists with the Missouri Pacific Railroad Company, the Natchez & Southern Railway Company, and the Texas & Pacific Railway Company. Notices of proposed changes in rules governing crew consists were served on the Brotherhood by these Carriers on January 25, 1964. In all, four notices were served (two by the Missouri Pacific), and four special boards, each with the same neutral member, were established by the National Mediation Board. The Brotherhood

refused to participate in proceedings before any of the special boards. All four boards handed down their awards on May 6, 1964, and the Carriers announced their intention to put the awards into effect on May 11, 1964. On the latter date, the BRT filed a complaint in the United States District Court for the Eastern District of Missouri and obtained a temporary restraining order against effectuation of the awards. Subsequently, on May 28, 1964, following a hearing, District Judge Meredith dismissed the complaint and dissolved the injunction.

The Brotherhood then filed a motion for supplemental relief in the impeachment proceedings which had been brought in the United States District Court for the District of Columbia. On June 9, 1964, District Judge Holtzoff issued an order denying the injunctive relief requested by the BRT, and the Brotherhood announced its intention to appeal. While that appeal was pending before the Court of Appeals for the District of Columbia, that court rendered the decision previously noted in the Milwaukee Railroad case. Thereafter, on June 24, 1965, the court ruled on the appeal in the instant case. Speaking this time through Circuit Judge Danaher, the court cited Judge Bazelon's earlier opinion in the Milwaukee case and concluded:

> We have not had the views of Arbitration Board 282 on two questions: (1) whether or not the Special Boards of Adjustment had been required to conduct the arbitrations in compliance with sections 7 and 8 of the Railway Labor Act; and (2) whether or not the notices which were served by the Carriers proposing changes in the crew consist complied with the directives of Board 282 by clearly identifying the assignments or the operations affected by the proposed changes.
>
> We are satisfied that such questions properly come within the purview of the Board's primary jurisdiction. Thus, we remand with directions that the District Court enter its appropriate order with respect to the Brotherhood's motion for supplemental relief. The order will include permission to any party, as it may

be advised, and within a time fixed by the court, to submit further application to Board 282 that consideration may there be afforded with respect to the questions above specified.

On September 13, 1965, following the remand, Judge Holtzoff issued another order denying the Brotherhood's motion for supplementary relief without prejudice to the submission, within 30 days, of an application by any party to Arbitration Board 282 "to consider the following [three] questions." The first two questions specified in the court's order are the same as those numbered (1) and (2) in the excerpt from Judge Danaher's opinion quoted above. The third reads as follows: "What significance should be attached to the failure of the Brotherhood . . . to raise the issues contained in questions 1 and 2 above before the Special Boards of Adjustment." BRT Question 36 was submitted to this Board on August 4, 1965. Although it includes many questions in addition to those listed in Judge Holtzoff's order of September 13, we believe the Brotherhood is entitled to answers to all of them.

The foregoing recital of the events preceding our consideration of BRT Questions 32, 33, and 36 is sufficient explanation for our departure from the usual manner of answering questions involving the interpretation of our Award. Moreover, in a further departure from our usual procedure, we heard oral argument on these three questions by counsel for the interested parties and received extensive briefs. Having had the benefit of these oral and written arguments, we believe it important not only to answer the specific questions presented to us, but also to clarify for all parties to this Award some of the broader issues involved.

Considerable controversy has been generated over the nature and legal status of the special boards of adjustment provided for in Section III, Part B, of Award 282. There can be no doubt of the Board's intention in this regard, nor do we think the relevant provisions of the Award are reasonably susceptible of a contrary interpretation. The special boards of adjustment contemplated by Board 282 are unique creations, differing from both the

statutory arbitration boards provided for in Section 7 of the Railway Labor Act and the National Railroad Adjustment Board and system, group, and regional boards provided for in Section 3 First and Second of the Act, respectively. They are ad hoc arbitration boards; their structure and function were specially designed to meet the peculiar needs of the parties affected by Section III of the Award.

The problem facing Board 282 was to provide a means for the final disposition of disputes over the size of train crews subject to challenge, on the local properties, in accordance with the guidelines set forth in Section III, Part C, of the Award. It was equally important that these dispositions be made as promptly as the requirements of a full and fair hearing and adequate time for deliberation could permit. The types of boards provided for in Sections 3 and 7 of the Railway Labor Act were obviously not suited for these purposes. The procedures of the National Railroad Adjustment Board are notoriously slow, and the existing backlog of cases in the First Division made it certain that most, if not all, of the anticipated disputes over crew consists would not be heard during the life of Award 282. Likewise, the procedures for the establishment and conduct of statutory arbitration boards under Section 7 of the Act were too cumbersome and formal for our purposes; moreover, by definition, they depend for their establishment upon "agreement of the parties," which was obviously lacking in this case. Accordingly, the Board directed that crew consist disputes be submitted to special boards of adjustment, specially designed for the task, in accordance with those procedural requirements deemed necessary to insure a prompt, equitable, and final disposition of these controversies.

The organizations affected by the Award argue that these special boards of adjustment are bound by the rules applicable to the statutory arbitration boards provided for in Section 7 of the Railway Labor Act. We reject that contention as completely erroneous. Section 7 First of the Act provides for a board of either three or six persons; our Award stipulates a board of three. Section 7 Third (f) requires that the arbitration board shall furnish

a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings certified by at least a majority of the board, to the clerk of the federal district court for the district in which the controversy arose, and that certified copies shall also be filed with the National Mediation Board and the Interstate Commerce Commission. Our Award imposes no such requirements. Thus, the logic of the organizations' argument forces them to concede that an award rendered by a Special board of adjustment pursuant to the procedures and guidelines laid down in Award 282, which has been accepted by the parties and put into effect, can nevertheless be voided by either party at some future date because certified copies of the record were not filed with the court, the Mediation Board, and the Commission. We think such a conclusion is plainly contrary to the letter and the spirit of Award 282.

There is nothing to be gained by listing all the differences between Section 7 boards and the special boards of adjustment provided for in Award 282. It should be specially noted, however, that Section 7 Third (e) provides for compensation of the neutral arbitrators by the Mediation Board, whereas Section III B (3) of our Award declares that the "costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement." Finally, we call attention to the omission (which was deliberate) from our Award of the elaborate procedural requirements set forth in Section 8 of the Act.

It is true that Section 4 of Public Law 88-108, which established Board 282, states that "To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of the said Act." We think it clear that the quoted language applies only to Board 282 and not to the special boards of adjustment provided for in its Award. Whether

the decision in *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago B. & Q. R.R.*, 225 F. Supp. 11 (D.D.C.), *aff'd*, 331 F.2d 1020 (D.C. Cir.), *cert. denied*, 377 U.S. 918 (1964), upholding the validity of the Award, is *res judicata* in so far as this issue is concerned, is a judicial question as to which we venture no opinion. We do affirm, however, that it was never our intention that the special boards of adjustment for which we provided would be subject to Sections 7 and 8 of the Railway Labor Act.

Perhaps the most distinguishing feature of the special boards of adjustment provided for in Award 282 is that they are compulsory. Doubtless, this was taken into account by Judge Bazelon, and was responsible in part for his observation that "The Board's delegation of the crew consist issue to special boards should not mean that such boards, and in particular their single neutral members, could settle a dispute by compulsory arbitration without being subject to any meaningful review." We turn, therefore, to a discussion of "meaningful review".

At the outset, we wish to emphasize that, in our judgment, a "meaningful review" in the context of Award 282 is not a trial de novo. As we have repeatedly stated, our purpose in providing for special boards of adjustment was to bring about prompt and final settlement of disputes over crew consists. We recognized that these disputes were complex and varied, and that they could be equitably resolved only after a careful and detailed examination of local conditions and the application of the guidelines laid down in the Award. A trial de novo, following an appeal to Board 282 from the decision of a special board, would thus defeat the entire purpose of our decision. It would not only make it impossible to dispose finally of more than a few cases during the statutory life of the Board; it would also contradict the underlying assumption that sound rulings could be based only upon an intimate knowledge of local conditions.

Even if we were otherwise disposed to grant trials de novo in these disputes, we would be foreclosed from doing so by Public Law 88-108. Whatever the legal status of the special boards of adjustment may be, Board 282 is

governed by the provisions of Sections 7 and 8 of the Railway Labor Act. Section 7 Third (c), as applied to this Board, provides that it may be reconvened on the motion of either party "to pass upon any controversy over the meaning or application" of *its* Award, but that "No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board . . . ." In short, the Board is prohibited by the statute from interpreting any award but its own.

How, then, can this statutory restriction on the Board's jurisdiction be squared with the concept of "meaningful review"? We think the answer is suggested in footnote 4 of Judge Bazelon's opinion:

> We upheld the Board's authority to delegate the crew consist issue to special boards in *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, B. & Q. R. Co.* . . . . But *cf. Schechter Poultry Corp.* v. *United States* . . . which holds that delegated authority must be defined by legislative standards; meaningful review procedures ensure that such authority is exercised within those standards.

In our judgment the applicable standards in this case are those specified in Award 282, and "meaningful review" involves neither more nor less than a determination whether a challenged decision by a special board has followed the procedures and applied the guidelines set forth in Section III, Parts A, B, and C, of that Award.

Whether or not a party has been deprived of due process in the constitutional sense is, of course, a question for the courts. We consider it part of a "meaningful review," however, to determine whether either party to a proceeding before a special board was deprived of a full and fair hearing, as that concept is normally understood and applied to ad hoc arbitration proceedings. In this sense due process does not require observance of the detailed procedural requirements of Section 8 of the Railway Labor Act. Moreover, we deem it incumbent upon any party seeking

a meaningful review of the decision of a special board to make such review possible by filing a timely objection to the proceedings and by providing us with an adequate record. A party which refuses to participate in the proceedings before the special board and files its formal objection only after decision has been rendered is, in the absence of extenuating circumstances, properly estopped from protesting that its procedural rights have been violated. As pointed out in footnote 7 of Judge Danaher's opinion,

> Courts will not lightly view a party's failure to request certain procedural rights, or even refrain from participation only thereafter to await the outcome and then challenge an unfavorable result. See United States v. Tucker Truck Lines, 344 U.S. 33, 37 (1952).

By the same token, a party wishing review of a decision by a special board must assume the obligation of providing a verbatim transcript or other satisfactory evidence of the proceedings before that board. If the opposing party refuses to share the cost of a transcript, and the neutral arbitrator determines, in the exercise of his discretion, that a transcript is unnecessary, the party desiring one is nevertheless entitled to have it; but with that right comes the obligation to pay the cost.

Pending its review of the record of the proceedings before Judge Robinson, the Board defers its answers to B.R.T. Question No. 32(A) and (B). The answers to B.R.T. Questions Nos. 32(C) and (D), 33, and 36(A), (B), (C), and (D) are set forth below.